

6-1-1964

Criminal Law -- The Right of the State to Appeal in Criminal Cases

Arnold T. Wood

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Arnold T. Wood, *Criminal Law -- The Right of the State to Appeal in Criminal Cases*, 42 N.C. L. REV. 887 (1964).Available at: <http://scholarship.law.unc.edu/nclr/vol42/iss4/8>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES AND COMMENTS

Criminal Law—The Right of the State to Appeal in Criminal Cases

I. INTRODUCTION

The arguments against allowing a governmental authority to appeal in criminal cases are founded on historical experience. The early kings of England defined criminality and persecuted those who opposed them.¹ They ordered the lords, barons, or others owing allegiance to them to sound the "hue and cry" and arrest these criminals in their name.² The prosecution of the criminal proceeded under the watchful eye and guidance of the Crown in courts subject to its influence.³

Two great abuses arose from this system of law enforcement. The King, having the authority to make the laws and determine which individuals were criminals, often failed to make that determination on the basis of social benefit or welfare. He could name as criminals those subjects who were objectionable to him personally and ignore social considerations. The other great danger in this scheme was the possibility of repeated attempts by the Crown to gain a conviction of the accused for his alleged offense irrespective of his actual guilt or innocence. This process of multiple trials is modernly recognized by the name "double jeopardy." The basis of double jeopardy is the possibility that the accused, found innocent by his peers, could have the facts of his case redetermined on the request of the State.⁴

These early abuses led, in part, to the signing of the Magna Carta⁵ which established that the government was below the law

¹ POOLE, DOMESDAY BOOK TO MAGNA CARTA 385-87 (1951).

² PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 378 (2d ed. 1936); Poole, *op. cit. supra* note 1, at 10, 392 (1951); POUND & PLUCKNETT, HISTORY AND SYSTEM OF THE COMMON LAW 55-61 (3d ed. 1927).

³ PLUCKNETT, *op. cit. supra* note 2, at 82-86.

⁴ Double jeopardy means the defendant is twice put in danger of conviction for the same offense. *State v. Watson*, 209 N.C. 229, 183 S.E. 286 (1935). This could occur in several ways. An accused could be tried repeatedly for the same offense in the trial courts. He could be convicted, pay his penalty, and then be retried. Or he could be tried in a lower court and carried to appellate courts by the Crown until he was convicted. The rule of double jeopardy prohibits a second punishment for a single offense as well as a second trial even if the defendant has never received punishment. *Kepner v. United States*, 195 U.S. 100 (1904).

⁵ Poole, *op. cit. supra* note 1, at 477. The Magna Carta was signed at

and not above it. Thus, the rule developed that the Crown could not, on its own motion, appeal criminal cases to a higher court.⁶ This restriction was absolute and barred appeals regardless of questions of double jeopardy. The idea that no person shall be twice put in jeopardy for the same offense was carried over to the colonies and remains a sacred principle in American criminal law. It is expressed in our various constitutions⁷ and is recognized in every court.⁸

The dangers of persecution that existed under the kings are still present to some degree under our representative form of government. The state retains both the power to enact the law and the authority to enforce it, but due to improvements, both organizational and social, these dangers are not imminent. Organizationally, these improvements are found in the governmental doctrine of separation of powers. No longer does a single authority legislate criminal codes, pursue the criminal and prosecute him at will. Social advances also play a large part in reducing harrassment of individuals. The right to vote and better educational and communicative facilities have made the more enlightened wishes of the people known to government officials. Consequently many jurisdictions have seen fit to allow the State to appeal in those criminal cases where questions of double jeopardy do not arise.

No appeal involving only *questions of law* could amount to double jeopardy. If the doctrine is interpreted as a bar to the right of the State to appeal in *all* criminal prosecutions, some obviously guilty individuals might be released to plague society. These releases would occur not because there was a possibility of double jeopardy but because the State could not appeal its legal questions. Logic demands that the law be correctly applied in criminal cases.

Runnymede in 1215 and reissued three times in the following three centuries. *Id.* at 477-78.

⁶ "At common law, the state cannot appeal.... [W]hether an appeal or writ of error will be at the instance of the state under the constitutional provision as to double jeopardy would seem to depend on the construction given to the provision by the court.... [T]he constitutional provisions differ in different states. Some provide that no one shall be twice put in jeopardy for the same offense; others that no one shall be twice put in jeopardy of life or limb.... [M]ost courts hold these phrases to be synonymous, and to prohibit a second trial for any offense." CLARK, CRIMINAL PROCEDURE 453 (2d ed. 1918).

⁷ U.S. CONST. amend. V; N.C. CONST. art. I, § 17.

⁸ As North Carolina has stated the rule, "No man shall be twice vexed for the same offense." *State v. West*, 71 N.C. 263, 264 (1874). See also *State v. Credle*, 63 N.C. 506 (1869); *State v. Taylor*, 8 N.C. 462 (1821).

If an appeal by the State is required to get the correct application, such appeal should be allowed. This thinking weighs heavily in some states,⁹ less in others.¹⁰ The trend in North Carolina has been to allow a relatively small degree of appellate authority on behalf of the State, limiting it to a few areas and refusing to grant appeal on many questions of law. North Carolina holds dear the feeling that the expansion of appellate powers of the State is action in an area, where its ancestors feared to tread and that it should avoid such action.¹¹

Early case law on the right of the State to appeal in North Carolina was inconsistent. At first, there was an absolute right on the part of the State to appeal.¹² However, this power was eliminated in the early case of *State v. Jones*¹³ which held that the State had absolutely no power of appeal. This strict rule remained in effect for fifty years, from 1809 until 1859,¹⁴ at which time the supreme court again reversed its opinion and granted a very limited appellate power to the State.¹⁵ During the ensuing years the court developed

⁹ *E.g.*, CONN. GEN. STAT. § 54-96 (1958). This section authorizes motions for new trials after acquittal. *State v. Carabetta*, 106 Conn. 114, 137 Atl. 394 (1927); *State v. Lee*, 65 Conn. 265, 30 Atl. 1110 (1894). CONN. GEN. STAT. § 54-96 (1958) is phrased as follows: "Appeals from the rulings and decisions of the superior court or of the court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused."

¹⁰ *E.g.*, TEXAS CONST. art. 5, § 26 which allows no state appeal in criminal cases.

¹¹ See *State v. Savery*, 126 N.C. 1083, 36 S.E. 22 (1900) where the court adopted as its own the following words: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. . . . In coming to this conclusion, we are aware that its effect may possibly be to turn lose a bad man upon society, but it is better in the administration of law [that] there should be an occasional instance of violence even to the sense of public justice, than that a principle should be established which, in times of civil commotion that may occur in the history of every country, would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges to crush the liberties of the citizen." *Id.* at 1090-91, 36 S.E. at 25.

¹² *State v. McLelland*, 1 N.C. 632 (1804); *State v. Haddock*, 3 N.C. 162 (1802).

¹³ 5 N.C. 257 (1809).

¹⁴ Between 1809 and 1859 two recorded cases were decided concerning the State's authority: *State v. Taylor*, 8 N.C. 462 (1821), which denied the State's appeal and *State v. Moore*, 29 N.C. 228 (1847), which was deemed a mistrial by the court and returned for venire de novo.

¹⁵ See *State v. Barnes*, 52 N.C. 20 (1859).

the scope of that power through comprehensive case law¹⁶ until, by 1883, it had grown to encompass appeals by the State on most questions of law which were apparent on the face of the record. Not all questions of law could be appealed, but only those arising from special verdicts,¹⁷ verdicts upon demurrer of the defendant,¹⁸ upon motions to quash,¹⁹ and upon arrest of judgment.²⁰

II. STATUTORY RIGHT OF APPEAL BY THE STATE

In 1883, prompted either by its own conscience or by the growth of the courts' power in determining the State's right to appeal, the Assembly enacted a statute which codified the right.²¹ This codification halted the growth of the power and put its control in the hands of the legislature. This legislative control is exemplified by the fact that the statute has remained almost unchanged since 1883. Amendments have been made,²² but the resemblance between the 1883 case law and the present codification is evident:²³

¹⁶ In 1869 it was decided the State had a "very small" right of appeal. *State v. Credle*, 63 N.C. 506 (1869). In *State v. Bailey*, 65 N.C. 426, 427 (1871), it was stated that neither the State nor the defendant could appeal from interlocutory judgments *except* in capital cases and serious misdemeanors. Later came the statement that no appeal was allowed where a general verdict of not guilty had been entered. *State v. Freeman*, 66 N.C. 647 (1872); *State v. Phillips*, 66 N.C. 646 (1872). Those errors of law apparent on the face of the record were considered appealable. *State v. Bobbitt*, 70 N.C. 81 (1874). In *State v. West*, 71 N.C. 263 (1874), the defendant had been released because the trial judge ordered a verdict of not guilty to be entered on the defendant's plea of former acquittal. The solicitor appealed and the supreme court found that such a verdict was a general verdict, and they could not accept the appeal unless it had been on a special verdict.

¹⁷ *State v. Powell*, 86 N.C. 640 (1882); *State v. Moore*, 84 N.C. 724 (1881); *State v. Padgett*, 82 N.C. 544 (1880); *State v. Lane*, 78 N.C. 547 (1878).

¹⁸ *State v. Powell*, 86 N.C. 640 (1882); *State v. Moore*, 84 N.C. 724 (1881); *State v. Swepson*, 82 N.C. 541 (1880); *State v. Lane*, 78 N.C. 547 (1878).

¹⁹ See note 18 *supra*.

²⁰ See note 18 *supra*.

²¹ N.C. CONSOL. STATS. § 4649 (1919); Revisal of 1905 § 3276; Code of 1883, § 1237. The attempt seems to have been made to write the 1883 case law into statutory form.

²² N.C. Sess. Laws 1945, ch. 701, which added N.C. GEN. STAT. § 15-179(5), (6) (1953).

²³ The original enactment N.C. Code of 1883, § 1237 read: "APPEAL BY STATE; IN WHAT CASES RECOGNIZED. An appeal to the supreme court may be taken by the state in the following cases, and no other. Where judgment has been given for the defendant.

(1) Upon a special verdict;

(2) Upon a demurrer;

§ 15-179. *When State may Appeal*.—An appeal to the Supreme Court or Superior Court may be taken by the State in the following cases, and no other. Where judgment has been given for the defendant—

1. Upon a special verdict.
2. Upon a demurrer.
3. Upon a motion to quash.
4. Upon arrest of judgment.
5. Upon a motion for a new trial on the ground of newly discovered evidence, but only on questions of law.
6. Upon declaring a statute unconstitutional.²⁴

In these situations the State cannot alter facts to secure a conviction. On appeal from a sustained demurrer or motion to quash, the case never has gone to trial on its merits; therefore, no facts have been recorded. On special verdicts and arrests of judgment the facts are decided by a jury and cannot be reviewed. Such appeals as these include only questions of law.²⁵ For this reason North Carolina has, by section 15-179, expanded certain rights of the State in an effort to secure judicial advantages.

A study of the cases interpreting the statute reveals that there is some degree of uncertainty in both definition and application of the statutory language. This uncertainty frequently results in errors which might have been avoided if more specific provisions had been formulated. In an attempt to clarify much of the confusion caused by the absence of legislative definitions, the following interpretations of the various subsections are offered along with discussions of the important cases.

A. The Special Verdict

A special verdict²⁶ is one in which the jury finds all the facts of the case and refers the decision of the cause upon those facts to the court.²⁷ It is a verdict of guilty or not guilty since the facts found

(3) Upon a motion to quash;

(4) Upon arrest of judgment.”

²⁴ N.C. GEN. STAT. § 15-179 (1953).

²⁵ N.C. GEN. STAT. § 15-179(5), is expressly limited to questions of law. Section 15-179(6), would evade factual questions since the constitutionality of a statute is implicitly a question of law.

²⁶ N.C. GEN. STAT. § 15-179(1) (1953), allows appeal by the State upon a special verdict in favor of the defendant.

²⁷ See *Mumford v. Wardwell*, 73 U.S. 423 (1867). However, a special verdict differs from findings in answer to interrogatories. A finding on interrogatories need not cover all material issues and *accompanies* a general verdict. A special verdict must cover all facts and is given *in place of* a general verdict. *State v. Hanner*, 143 N.C. 632, 57 S.E. 154 (1907).

by the jury "do or do not constitute in the law the offenses charged."²⁸ A judgment on a special verdict, since it involves only matters of law, is open to review at the instigation of either the defendant or the State.

The special verdict has several advantages in criminal cases. It simplifies the charge which the judge must give to the jury since there is no need to relate the law to the facts and it partially eliminates the element of sentiment in jury decisions.²⁹ It presumes the correct application of the law to the facts because this is done by the judge. By allowing the State to appeal the defendant cannot be said to be in double jeopardy. The facts are found, recorded, and cannot be altered. Only the application of the law by the judge may be examined.

A special verdict is open to review by a higher court, but when the judge sets aside a verdict, as may be done, he cannot on his own motion enter a general verdict of guilty or not guilty. In *State v. Moore*³⁰ the defendant was indicted for larceny of two barrels of turpentine. After the presentation of the evidence the jury was asked to return a special verdict. Instead it answered with two interrogatories of its own: If the court found turpentine to be the subject matter of larceny and if the court found the defendant did steal two barrels, then it, the jury, found the defendant guilty. The judge entered a verdict of not guilty and the State appealed upon the questions raised in the "special verdict." The appellate court refused to answer the questions on the ground that the jury verdict had been set aside, the judge replacing it with his own. The verdict was not given by the jury and therefore it was a nullity.

In *Moore* the court allowed the appeal for the purpose of recognizing the error of law which the trial judge had committed. The judge had made his own determination as to the proof of the allegation of larceny of two barrels of turpentine. This determination caused the "verdict" to be of a different nature from the findings of the jury. The judge's verdict was general and therefore

²⁸ *State v. Moore*, 29 N.C. 228, 230 (1847).

²⁹ It was once necessary that the judge, upon considering the finding of fact by the jury, instruct them as to his application of the law and require that the jury itself render the actual verdict upon his instructions. This is no longer a necessity, even though it is still acceptable. It is now sufficient if the trial judge simply hears the facts found by the jury and orders his judgment entered on the record. For an excellent note on this and related subjects see 13 N.C.L. REV. 321 (1935).

³⁰ 29 N.C. 228 (1847).

prohibited consideration of the legal questions on appeal by the State. The court, however, realized that it was bound to act on the appeal in some manner. It held that in such cases as these a mistrial is to be declared and a *venire de novo* ordered in the court below.³¹

If the jury simply neglects to decide determinative facts and the judge renders a special verdict in the proper form, the verdict is ineffective, but the appeal is allowed on the question of law decided by the judge. In *State v. Gullledge*³² the defendant was found guilty on "special verdict." The trial judge, on his own motion, ruled the defendant not guilty. The State appealed on the theory that there had been a special verdict. It was found that the facts determined by the jury were insufficient to adjudicate either innocence or guilt. Even though there could not have been a binding verdict if the judge had let the jury decision stand, the court held that the special verdict would support an appeal by the State.³³

Under section 15-179 the State may appeal to the superior court from the various lower courts. Thus, the question arises whether lower courts can render special verdicts. If the statute establishing the lower court so specifies, special verdicts can be rendered.³⁴ In those courts where such authority is not granted in the establishing act the power to issue special verdicts is undetermined.³⁵ If the lower court had the authority to sit with a jury in criminal pro-

³¹ 29 N.C. at 231.

³² 207 N.C. 374, 177 S.E. 128 (1934).

³³ This is not to say that where a judge sits without a jury he may call his verdict a "special verdict" and thereby grant the State an appeal. Such a verdict as this would be nothing more than an acquittal on a general verdict. *State v. Nichols*, 215 N.C. 80, 200 S.E. 926 (1938). See also *State v. Mitchell*, 225 N.C. 42, 33 S.E.2d 134 (1945), where the trial judge, upon hearing the facts as determined by the jury, decided the applicable statute was unconstitutional and ordered a "special verdict" on that ground. The solicitor appealed on the theory that there had been a special verdict. The appeal was not allowed on the ground that the constitutionality was a matter which the judge could decide at any time; therefore, the verdict was not based on the jury's findings, and no special verdict was given.

³⁴ *State v. Mallett*, 125 N.C. 718, 34 S.E. 651 (1899); *State v. Bost*, 125 N.C. 707, 34 S.E. 650 (1899).

³⁵ The supreme court announced its own uncertainty in *State v. Everett*, 244 N.C. 596, 94 S.E.2d 576 (1956), when it said: "Before the 1945 amendment... the State had no right of appeal to the Superior Court from the judgment of an inferior court of competent jurisdiction given for the defendant upon a special verdict... The 1945 amendment implies that there may be circumstances under which the State has such right of appeal. *Quaere*: Unless the statute under which a recorder's court is established so provides, may the judge of such court return a *special verdict*?" [Dismissed on other grounds.] *Id.* at 597, 94 S.E.2d at 577.

ceedings, the implication is that there could be a special verdict rendered. This implication is raised by both the history of special verdicts in this State³⁶ and the language of section 15-179 itself which in no way limits the use of the special verdict. On the other hand, if the inferior court is forbidden to use the jury, the judge could not render a special verdict, and if he attempted to do so, the judgment would be construed as a general verdict.³⁷

B. The Demurrer

Subsection 15-179(2) contemplates a common law demurrer to the indictment.³⁸ Such a demurrer admits the facts as stated in the indictment but attacks their legal effect.³⁹ Consequently, it presents only questions of law which are appealable by the State.⁴⁰ On demurrer facts are never presented to the jury for consideration. Any evidence taken on the demurrer is considered by the judge and goes to the question of the validity of the trial *to be had*, not to the guilt or innocence of the defendant.⁴¹

The State may appeal the sustaining of a demurrer, but the defendant may not appeal if the demurrer is overruled. This is because sustaining such a demurrer amounts to a final judgment, whereas if the demurrer of the defendant is overruled, it is in the form of an interlocutory judgment which cannot be appealed.⁴² The defendant, however, may hold his exception, but he must proceed with the trial.

There is a possibility of confusion as to the breadth of the appellate power given under subsection 15-179(2). Section 15-173 apparently provides for a motion called a "demurrer to the evidence,"⁴³ but this motion could not be within the purview of subsection 15-179(2). Historically, the State has never appealed after a

³⁶ Notice the use of the special verdict in *Ahoskie v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930); *State v. Crawford*, 198 N.C. 522, 152 S.E. 504 (1930); *State v. Corpening*, 191 N.C. 751, 133 S.E. 14 (1926).

³⁷ See note 33 *supra*.

³⁸ See note 44 *infra* and accompanying text.

³⁹ *State v. Edwards*, 190 N.C. 322, 130 S.E. 10 (1925).

⁴⁰ See *State v. Harris*, 106 N.C. 682, 11 S.E. 377 (1890).

⁴¹ *State v. McDowell*, 84 N.C. 798 (1881).

⁴² See *State v. Blades*, 209 N.C. 56, 182 S.E. 714 (1935); *State v. Harris*, 106 N.C. 682, 11 S.E. 377 (1890); *State v. McDowell*, 84 N.C. 798 (1881); *State v. Fishplate*, 83 N.C. 654 (1880); *State v. Bailey*, 65 N.C. 426 (1871).

⁴³ N.C. GEN. STAT. § 15-173 (1953) is entitled "Demurrer to the Evidence" and provides, in part: "the defendant may move to dismiss the action, or for judgment as in the case of nonsuit."

demurrer to the evidence,⁴⁴ but there is a more valid reason. Section 15-173 when originally enacted in 1913 was captioned by the Assembly as "an act to provide for judgment of nonsuit in criminal actions."⁴⁵ The misnomer of "demurrer to the evidence" was inserted as a title to the section by the publisher in 1919 in the consolidated statutes.⁴⁶ When minor amendments were made in 1951 the Assembly again referred to the amendment as one to amend the section relating to motions to dismiss or judgments of nonsuit in criminal actions.⁴⁷ The subtitle "demurrer to the evidence" which had been entered by the publisher was merely carried over by the legislature, obviously without realizing that it was perpetrating a previous editorial error. The section itself makes no mention of a demurrer to the evidence, but mentions only motions to dismiss and nonsuits.⁴⁸ It is evident that the legislature did not mean to grant, by section 15-173, any form of demurrer which would be within the authority granted in section 15-179(2).

Demurrers to the indictment usually attack the allegations on the theory that they do not state facts sufficient to constitute a criminal offense, and most of the reported cases in North Carolina were appealed from demurrers sustained on that ground.⁴⁹ However, it is entirely possible that an indictment may be defective for other reasons. In *State v. Harris*⁵⁰ the defendant had demurred on the ground that there were "several counts charging distinct offenses, but of the same grade and punishable alike."⁵¹ This was apparently

⁴⁴ The only cases which have been appealed under N.C. GEN. STAT. § 15-179(2) are *State v. Truitt*, 239 N.C. 590, 80 S.E.2d 637 (1954); *State v. Stewart*, 239 N.C. 589, 80 S.E.2d 636 (1954); *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954); *State v. Parker*, 209 N.C. 32, 182 S.E. 723 (1935); *State v. Morris*, 208 N.C. 44, 179 S.E. 19 (1935); *State v. Edwards*, 190 N.C. 322, 130 S.E. 10 (1925); *State v. Harris*, 106 N.C. 682, 11 S.E. 377 (1890). These cases have all been appealed on common law demurrers which were sustained. There has never been an appeal under N.C. GEN. STAT. § 15-179(2) on a "demurrer to the evidence" mentioned in the caption to N.C. GEN. STAT. § 15-173 (1953).

⁴⁵ N.C. Sess. Laws 1913, ch. 73.

⁴⁶ N.C. CONSOL. STATS. § 4643 (1919).

⁴⁷ N.C. Sess. Laws 1951, ch. 1086.

⁴⁸ See N.C. GEN. STAT. § 15-173 (1953).

⁴⁹ See *State v. Truitt*, 239 N.C. 590, 80 S.E.2d 637 (1954); *State v. Stewart*, 239 N.C. 589, 80 S.E.2d 636 (1954); *State v. Felton*, 239 N.C. 575, 80 S.E.2d 625 (1954); *State v. Parker*, 209 N.C. 32, 182 S.E. 723 (1935); *State v. Morris*, 208 N.C. 44, 179 S.E. 19 (1935); *State v. Edwards*, 190 N.C. 322, 130 S.E. 10 (1925).

⁵⁰ 106 N.C. 682, 11 S.E. 377 (1890).

⁵¹ 106 N.C. at 687, 11 S.E. at 378.

a demurrer for misjoinder of criminal offenses even though the facts alleged constituted the various crimes. The court held the demurrer valid and allowed the State to appeal under subsection 15-179(2).

The trial judge may use his discretion in considering a demurrer, but upon granting it he must leave the parties in their present situation. When a judge sustains a demurrer and returns a "verdict of not guilty" thereon, the State may appeal upon a showing that the "verdict" was, in fact, based on demurrer.⁵² Thus, if the State can procure another indictment, it has the right to do so.

C. The Motion to Quash

At common law the motion to quash was allowed against any indictment insufficient on its face,⁵³ whether the insufficiency was material or *de minimus* in form.⁵⁴ In North Carolina the use of the quashal is more restricted. There have been statutory modifications which limit the right of the defendant to make a motion to quash so that no quashal is allowed if "sufficient matter appears in the indictment to enable the court to proceed to judgment."⁵⁵ Also eliminated is the requirement of legal words of art such as "with force of arms" and "against the form of the statute."⁵⁶

Most jurisdictions allow the motion to quash only where the insufficiency is apparent on the face of the indictment.⁵⁷ North Carolina, however, allows the defendant to make motions in those cases where "relevant facts exist *dehors* the record" and can be proven.⁵⁸ It has been said that the trial court is allowed on its own motion to require a quashal in those cases where it is apparent the court has no authority.⁵⁹

⁵² See *State v. Parker*, 209 N.C. 32, 182 S.E. 732 (1935), where the defendant was the father of an illegitimate child born before the bastardy act was passed. He was tried under the act. He demurred and the judge held him not guilty. The State appealed. The court, on appeal, reversed the trial judge even though "this could not be done upon a demurrer." *Id.* at 33, 182 S.E. at 733.

⁵³ CLARK, CRIMINAL PROCEDURE 416-21 (1918).

⁵⁴ *People v. Cooper*, 366 Ill. 113, 7 N.E.2d 882 (1937).

⁵⁵ See N.C. GEN. STAT. § 15-153 (1953).

⁵⁶ See N.C. GEN. STAT. § 15-155 (1953).

⁵⁷ See Clark, *op. cit. supra* note 53, at 416-21 (1918).

⁵⁸ *State v. Bowman*, 145 N.C. 452, 455, 59 S.E. 74, 76 (1907): "While it is held in many jurisdictions that a motion to quash can only be made for matter apparent in the record . . . it is otherwise with us. And a plea of the kind interposed here has been sanctioned as a proper method, in motions to quash, by which the relevant facts exist *dehors* the record should be made to appear."

⁵⁹ The court explained the duties of the lower courts in *State v. Miller*,

The motion to quash is, in form, a motion and not a plea and it should be allowed for all material errors surrounding the proceedings. Some of the reasons for which indictments have been quashed in North Carolina and which have supported appeal by the State are: unconstitutionality of the statute on which the indictment was drawn⁶⁰ and "no evidence" on which the grand jury could find an indictment.⁶¹

There have been several cases that have taxed the court's ability to define quashal for the purpose of the State's appeal, due to the fact that North Carolina allows facts *dehors* the record in such cases.⁶² The "dehors rule," since it allows an introduction of facts, seems to produce difficulty in deciding when double jeopardy is involved in quashal decisions. In *State v. Bowman*⁶³ the State appealed a judgment for the defendant which had been granted on a plea of statutory immunity. The defendant contended that the State had no right to appeal under the immunity statute. The court answered that for "the purpose of the appeal," the defendant's plea should be considered as a motion to quash and brought within the provisions of subsection 15-179(3).⁶⁴ The court reached a different result, however, in *State v. Wilson*⁶⁵ where the prisoner pleaded that the indictment was issued for an offense for which he had previously been tried. The trial judge allowed the "motion to quash" and

100 N.C. 543, 5 S.E. 925 (1888), where it said: "Generally and ordinarily, a motion to quash the indictment made by the defendant, should not be allowed, if made after the plea of not guilty, but such motion, on the part of the State, may be allowed at any time before the defendant has been actually tried upon the indictment. It seems, however, that the court has authority, to be exercised in its discretion, to allow the motion to be made by the defendant after his plea of not guilty, and there are cases in which such motion should be allowed at any time, as when it appears from the indictment that the court has no jurisdiction. This objection may, be taken by mere suggestion, or by motion, or the Court may *ex mero motu*, take notice of it. Neither consent nor waiver can give jurisdiction, and the court will not proceed when it appears from the record that it has no authority." *Id.* at 545, 5 S.E. at 926.

⁶⁰ See *State v. Wilkes*, 233 N.C. 645, 65 S.E.2d 129 (1951), where the statute authorizing a fine for violation of parking meters was contested, but no decision was made on the validity of the act since the action was brought in the superior court which did not have jurisdiction. See also *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961).

⁶¹ *State v. Barnes*, 52 N.C. 20 (1859).

⁶² *E.g.*, *State v. Wilson*, 234 N.C. 552, 67 S.E.2d 748 (1951); *State v. Bowman*, 145 N.C. 452, 59 S.E. 74 (1907).

⁶³ 145 N.C. 452, 59 S.E. 74 (1907).

⁶⁴ 145 N.C. at 455, 59 S.E. at 75.

⁶⁵ 234 N.C. 552, 67 S.E.2d 748 (1951).

released the prisoner. The State appealed. The supreme court refused to hear the appeal on the ground that this was not a granting of a motion to quash but was a plea of *autrefois acquit*.

There is a legal distinction between the defenses used in *Bowman* and *Wilson*. The accused is claiming prior jeopardy if his defense rests on *autrefois acquit*, while a plea of immunity supports no such allegation. However, the differentiation of these defenses for the purpose of subsection 15-179(3) is not convincing. In both *Bowman* and *Wilson* the court allowed evidence *dehors* the record. These "outside" facts do not go to the merits of the defendant's case and cannot raise the issue of jeopardy. They deal with the validity of the proposed trial. Both motions attempt to avoid the entire trial, not the allegations in the indictment.⁶⁶ If the plea of prior acquittal is denied on appeal, then it becomes a legal conclusion that a continuation of the present proceedings would not constitute *double jeopardy*. A review of the plea of immunity would involve the legal construction of the immunity statute and not extraneous facts. Consequently, both these defenses, pleaded in bar to the entire proceedings or in abatement of the indictment on extraneous facts, should be included under motions to quash.⁶⁷

The court has, on occasion, shown leniency in its consideration of quashals. In the case of *State v. Wilkes*⁶⁸ the defendant was tried for parking meter violations. He made a motion to quash on the ground that the statute was unconstitutional. The motion was sustained. On appeal by the State, the court avoided the question of the statute's constitutionality and held instead that the trial court had lacked jurisdiction to hear the case. Consequently, the quashal was allowed to stand even though the question of jurisdiction had not been raised by the defendant's motion in the trial court. Thus, while the State may appeal the granting of the motion and have its contentions sustained, it may nevertheless lose the case if another ground can be found on which the quashal could have been based. The effect is that the State must not only prepare an appellate brief on the specific grounds used in the lower court, but on any grounds which should have been pleaded by the defendant.

⁶⁶ *State v. Cooke*, 248 N.C. 485, 103 S.E.2d 846 (1958).

⁶⁷ *State v. Paramore*, 146 N.C. 604, 60 S.E. 502 (1908).

⁶⁸ 233 N.C. 645, 65 S.E.2d 129 (1951).

D. The Arrest of Judgment

A motion in arrest of judgment is one made after verdict to prevent entry of judgment.⁶⁹ It is based upon an insufficiency in the indictment or a fatal defect appearing on the face of the record.⁷⁰ Oddly, North Carolina allows facts *dehors* the record to promote quashals,⁷¹ but does not allow them when a motion in arrest of judgment is made.⁷² It is true that in the case of quashals the insufficiency of the indictment to support a verdict is recognized either before or during the trial, while in motions to arrest this insufficiency is noted after a verdict has been rendered; however, this distinction does not seem meaningful, and the legal effect of both is the same.⁷³

The constitutionality of a criminal statute may be questioned by several methods during a trial. The demurrer,⁷⁴ the motion to quash,⁷⁵ and the motion to arrest judgment⁷⁶ are all available for this purpose. It may be desirable, however, for a trial judge to postpone decisions on constitutional issues until all the evidence has been presented and the jury has returned a verdict. If the jury finds the defendant guilty and the judge allows a motion to arrest because of the constitutional question and is reversed on appeal, there would be no need for a new trial.

The case of *State v. McCollum*⁷⁷ poses an interesting problem in the use of the motion to arrest. The defendant was convicted of manslaughter and was ordered to pay the mother of his victim the sum of six dollars per week for five years. The mother passed away within a year, and the defendant petitioned the court to be relieved

⁶⁹ Appeal was allowed in *State v. Hall*, 183 N.C. 806, 112 S.E. 431 (1922), though the court noted the following insufficiency: "It was not correct to charge the jury that both parties could not be guilty of manslaughter, and the jury having convicted both, it was in the power of the court to have set aside the verdict as to Haney, but it did not do so. On the contrary, the record states that he arrested the judgment upon the verdict as to Haney as a matter of law and the State, under the statute, had the right to appeal. C.S., 4649(4) provides that the State may appeal 'where judgment is given for the defendant upon arrest of judgment.'" *Id.* at 813, 112 S.E. at 435.

⁷⁰ *State v. McCollum*, 216 N.C. 737, 739, 6 S.E.2d 503, 504 (1940).

⁷¹ See Part II, C, *supra*.

⁷² *State v. Walker*, 87 N.C. 541 (1882).

⁷³ Both are based on the premise that the judgment cannot lie because of some legal defect. It ought to be unimportant whether these defects are apparent on the record or *dehors* the record.

⁷⁴ *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948).

⁷⁵ *State v. Wilkes*, 233 N.C. 645, 65 S.E.2d 129 (1951).

⁷⁶ *State v. Hall*, 183 N.C. 806, 112 S.E. 431 (1922).

⁷⁷ 216 N.C. 737, 6 S.E.2d 503 (1940).

of further payments, whereupon the victim's father asked to have them continued. The judge authorized the discontinuance of further payments and the State appealed on the basis that there had been an "arrest of judgment" since the payments were halted. The supreme court denied the State's appeal on the ground that this was not an arrest of judgment of "ordinary legal significance,"⁷⁸ and that therefore the appeal could not lie under subsection 15-179(4). In refusing the appeal of the State, the court failed to mention any right of the father to appeal. Although the father was not asking review he should have such a right in these cases.⁷⁹ The intervention of the father should be construed to change the character of the criminal action to that of a civil suit for enforcement of a money judgment and such controversies are appealable by the intervenor.⁸⁰

*E. The Motion for a New Trial on Newly Discovered Evidence—
The Constitutionality of a Statute*

Subsections 15-179(5) and (6) were enacted in 1945⁸¹ to overrule two cases which had been decided by the North Carolina Supreme Court, and it is necessary to examine the holding and effect of the individual decisions in order to determine their intended scope.

Prior to 1945 neither the defendant nor the State could appeal from the ruling of the judge on a motion to grant a new trial on the ground of newly discovered evidence.⁸² This determination by the judge was considered to involve no matter of law or legal inference.⁸³ It was reasoned that the State had obtained its conviction and that if the defendant wanted to reopen the issues, it was within the

⁷⁸ 216 N.C. at 739, 6 S.E.2d at 504.

⁷⁹ The court at one point infers such a right when it distinguishes the State's argument by stating: "The cases cited by appellant [State] are not in point. In *S. v. Beatty*, 66 N.C., 648, a bastardy case under the law then in force, the appeal was taken by the relator; and in *S. v. Parsons*, 115 N.C., 730, 20 S.E., 511, another bastardy case, the prosecutrix appealed." 216 N.C. at 739, 6 S.E.2d at 504.

⁸⁰ Decisions from all civil suits between private parties are appealable since double jeopardy does not apply to civil actions. *State v. Watson*, 209 N.C. 229, 231, 183 S.E. 286, 287 (1936).

⁸¹ N.C. Sess. Laws 1945, ch. 701.

⁸² *State v. Moore*, 202 N.C. 841, 163 S.E. 700 (1932); *State v. Griffin*, 202 N.C. 517, 163 S.E. 457 (1932); *State v. Cox*, 202 N.C. 378, 162 S.E. 907 (1932).

⁸³ *Griffin* and *Cox* both held that the granting or denial of a motion for new trial on new evidence was in the trial judge's discretion. *Griffin* went further and said that the reason such action was not appealable was because it involved no matter of law or legal inference. 202 N.C. at 518, 163 S.E. at 457.

judge's discretion to let him do so.⁸⁴ The judge's order allowing the motion, when made in a criminal action, is conclusive on the State.⁸⁵ The epitomy of this logic was brought out in *State v. Todd*.⁸⁶ The defendant had been convicted of murder and asked for a new trial to consider newly discovered evidence. The judge allowed the motion and the State appealed⁸⁷ on the question of whether the evidence which defendant presented was within the legal definition of "newly discovered evidence."⁸⁸ The court in refusing to consider the appeal said issues of this type were within the "and no other" part of section 15-179 and thereby prohibited.⁸⁹

State v. Todd precipitated the enactment of subsection 15-179(5)⁹⁰ which allows appeal by the State on a motion for a new trial by the defendant. There is little need to refuse the State such a right in these cases. The questions presented on motions for new trial on new evidence do not of themselves involve double jeopardy. The questions on such motion go only to the character of the "new evidence." The holding in *Todd* refusing the appeal subjected the State to the rigors of a new trial when there were valid *legal* questions concerning the validity of the new evidence. The court missed the opportunity to clarify legal issues which might have reduced future litigation.

On the motions for new trial it is the defendant, not the solicitor, who is asking for another trial on the merits of his new evidence.

⁸⁴ *State v. Griffin*, 202 N.C. 517, 518, 163 S.E. 457 (1932).

⁸⁵ *State v. Cox*, 202 N.C. 378, 380, 162 S.E. 907, 909 (1932).

⁸⁶ 224 N.C. 776, 32 S.E.2d 313 (1944).

⁸⁷ The State also sought certiorari. In refusing to consider the case the court refused to grant certiorari in its supervisory capacity. Note that certiorari is implicitly limited to those cases where the State could have appealed, but the right of appeal has been lost in some way.

⁸⁸ In *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931), the court outlined the prerequisites to the granting of new trials on newly discovered evidence. It was held that it must appear: "1. That the witness or witnesses will give the newly discovered evidence.... 2. That such newly discovered evidence is probably true.... 3. That it is competent, material and relevant.... 4. That due diligence was used and proper means were employed to procure the testimony at trial.... 5. That the newly discovered evidence is not merely cumulative.... 6. That it does not tend only to contradict a former witness or to impeach or discredit him.... 7. That it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail." *Id.* at 624-25, 161 S.E. at 83-84.

It was also stated in *Casey* that new trials on newly discovered evidence could only be granted in the superior court and never in the supreme court in criminal cases. *Id.* at 625, 161 S.E. at 84.

⁸⁹ *State v. Todd*, 224 N.C. 776, 777, 32 S.E.2d 313 (1944).

⁹⁰ N.C. GEN. STAT. § 15-179(5) (1953).

If the defendant has valid evidence it would be logical to grant his motion; however, if such evidence is legally invalid it could do him no harm to have the State appeal on that issue prior to the proposed new trial.

The right of appeal from judgments declaring a statute unconstitutional has a different history. Defendants had always had the power to contest the validity of statutes in many ways. Statutes had been tested by demurrer, quashals and arrests of judgment.⁹¹ All of these methods were in use prior to 1945, and an appeal by the State was allowed in every case.⁹² But in 1945 a constitutional question was presented in the case of *State v. Mitchell*.⁹³ The defendant was indicted for practicing palmistry. His defense was the invalidity of the act under which he was being tried. The jury returned a "special verdict" holding the defendant not guilty because the statute was prohibited by the constitution.⁹⁴ The State appealed the verdict on the theory that it was returned on the special verdict. The supreme court, however, found the verdict was based, not on the facts found, but on the judge's conclusion that the statute was invalid. The court reasoned that the judge could rule on statutory validity at any time during the trial; therefore, the special verdict, as such, was without effect.⁹⁵ With the statutory ground for appeal, the special verdict, eliminated the court held that there was nothing on which the State could support its appeal, and it was dismissed.

The *Mitchell* case was apparently the first decision which refused appeal by the State where a statute had been declared invalid.⁹⁶ This prompted the legislature to enact subsection 15-179(6)⁹⁷ granting appeal in all such cases. Appeals on statutory validity are now al-

⁹¹ See notes 74, 75, 76 *supra*.

⁹² *E.g.*, *Ahoskie v. Moye*, 200 N.C. 11, 156 S.E. 130 (1930); *State v. Yarboro*, 194 N.C. 498, 140 S.E. 216 (1927); *State v. Corpening*, 191 N.C. 751, 133 S.E. 14 (1926); *State v. Jones*, 191 N.C. 371, 131 S.E. 734 (1926).

⁹³ 225 N.C. 42, 33 S.E.2d 134 (1945).

⁹⁴ N.C. CONST. art. II, § 29.

⁹⁵ 225 N.C. at 42, 33 S.E.2d at 134-35.

⁹⁶ The decision of the court in *Mitchell* was faulty in that it went only halfway. The court correctly recognized that the judge had ruled on his own motion to determine the validity of the act. The court, however, failed to recognize that this motion must have had some nature of its own, even though made by the judge. It must have had some substantive basis such as an arrest of judgment (as apparently used in *Mitchell*) or quashal. Testing constitutionality is only the object of the motion, it is not in itself a motion. Using this logic the court could have brought the State's right to appeal within N.C. GEN. STAT. § 15-179, as it then stood.

⁹⁷ N.C. GEN. STAT. § 15-179(6) (1953).

lowed indirectly under most subsections of section 15-179⁹⁸ and specifically by subsection 15-179(6). The problem of appellate authority present in *Todd* is no longer a consideration.⁹⁹

III. CERTIORARI

The North Carolina Constitution grants the supreme court the "power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts."¹⁰⁰ The power to use remedial writs, such as the writ of certiorari, in any type of lower court action has presented problems as it applies to the State's power to appeal. If certiorari can be used by the State when it does not have a right of appeal, its use would be in derogation of section 15-179. If the use of a writ of certiorari is allowed only where the State has lost its appellate power it could be regarded as detrimental to the defendant. Yet, the authority for the use of the writ is stated in the constitution and it must have some accepted application.

This conflict was realized early in our judicial history. In *State v. Sweptson*¹⁰¹ the trial judge refused to amend the record to show that the State had not waived the appearance of the defendant at trial. The State asked for a writ of certiorari to have the record amended. The North Carolina Supreme Court granted a writ¹⁰² on the theory that it was within the supervisory powers of the court to amend the record when the trial judge had abused his discretion. However, the court recognized the possibility that the State might avoid statutory limitations if the writ was available without limitation and in order to narrow its use the court laid down basic guidelines.¹⁰³ The supreme court reserved the right to issue *any* remedial writs in exercising its supervisory power, but limited itself in granting certiorari to the State in the following language: "[T]he right [of appeal] in the case of the State is . . . restricted . . . to errors of law on the face of judgments adverse to the State, on demurrer to the indictment, or on motion to quash or in arrest, or on a special

⁹⁸ See *State v. Hales*, 256 N.C. 27, 122 S.E.2d 768 (1961); *State v. Wilkes*, 233 N.C. 645, 65 S.E.2d 129 (1951); *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948).

⁹⁹ But see *State v. Wilkes*, 233 N.C. 645, 65 S.E.2d 129 (1951).

¹⁰⁰ N.C. CONST. art. IV, § 8.

¹⁰¹ 83 N.C. 584 (1880).

¹⁰² In *Sweptson* the court granted a writ of error, but took the opportunity to outline the limits within which a writ of certiorari could be granted.

¹⁰³ 83 N.C. at 586.

verdict. . . . And in case of appeal lost without laches . . . the State in the instances aforesaid, may have a writ of *certiorari* . . . as a substitute for an appeal."¹⁰⁴ Thus, the State can obtain *certiorari* only in those cases in which it has previously had a right of appeal and has lost that right without laches.

There was no indication in *Sweptson* that writs of *certiorari* could only be granted where the error was apparent on the face of the record. Indeed, in that case, the error complained of was that certain information had been omitted from the record. But in *State v. Todd*,¹⁰⁵ it is stated that the error must appear on the trial record in order to be corrected by the court on *certiorari*.

The use of the writ of *certiorari* is well established in North Carolina. However, a change would be in order to put the law into perspective. The language of the constitution grants the court a complete power to issue *any* remedial writ in its supervisory capacity.¹⁰⁶ The court, on its own motion, as seen from the above discussion, has undertaken to limit the use of this power. Nevertheless, the power of the court to grant unlimited review through the use of supervisory writs remains and can only be irrevocably limited by an amendment.¹⁰⁷

IV. THE GENERAL VERDICT

A general verdict may be rendered by a judge or a jury, upon consideration of the facts and law presented at trial.¹⁰⁸ When the accused has been tried and acquitted on a general verdict the result is final and conclusive, and no appeal is allowed the State.¹⁰⁹ These findings are not appealable because the verdict declares that the facts essential to establish the defendant's guilt were not proven on the merits of the evidence. An appeal on a general verdict would necessarily put before the appellate court questions of fact. If the court

¹⁰⁴ *Ibid.*

¹⁰⁵ 224 N.C. 776, 777, 32 S.E.2d 313, 314 (1944).

¹⁰⁶ N.C. CONST. art. IV, § 10.

¹⁰⁷ An amendment would not be necessary for the supreme court to grant review in those cases where the error does not appear on the record. Under the power to issue *any* supervisory writs, the court could review errors on as well as *dehors* the record. See N.C. CONST. art. IV, § 10.

¹⁰⁸ Some jurisdictions have held that only a jury can render a general verdict. See *Fisher v. Drew*, 247 Mass. 178, 141 N.E. 875 (1924). But North Carolina has held that a judge sitting without a jury can render only a general verdict. *State v. Nichols*, 215 N.C. 80, 200 S.E.2d 926 (1939). In comparison, a special verdict rests on a finding by the jury of facts only. See note 27 *supra*.

¹⁰⁹ *E.g.*, *State v. Powell*, 86 N.C. 640 (1882).

were allowed to review general verdicts, it would have the ability to redetermine factual issues. This would put the accused in double jeopardy.

If there has not been a general verdict, there may be a right of appeal under section 15-179.¹¹⁰ In order to bar the appeal it must be determined that there has in fact been a general verdict and that the verdict constituted an acquittal. The verdict, to be general, should be given by a body which has considered the issues of both law and fact. The acquittal which is rendered must be a finding of not guilty and must rest on the merits.¹¹¹

The rule that the State cannot appeal from general verdicts has been stated in many North Carolina decisions.¹¹² The leading case is *State v. Savery*¹¹³ which involved issues dealing with a "general verdict" on a warrant charging a misdemeanor. In *Savery* the jury was impaneled and the first witness sworn. This witness was the prosecutor who testified that even though the warrant did not contain an affidavit, he was the witness who was mentioned therein. On realizing the warrant contained no affidavit the defendant moved for a "verdict of not guilty." The State asked that the case be heard on its merits or that the warrant be dismissed with leave to the State to retry the defendant. The judge denied the State's objection and instructed the jury to return a verdict of not guilty for the defendant. From this verdict the State appealed.

On appeal the majority were of the opinion that a general verdict had been entered and there could be no appeal. Their opinion turned on three essential issues. First, the court found that the rule of

¹¹⁰ The statute is a restrictive statute. This created an innocuous situation in the early days of its enactment. The supreme court had said that since the statute granted an appeal only to that court, the State could only appeal from a lower court to the superior courts in those circumstances in which it was specifically provided by the act creating the lower courts. *State v. Bost*, 125 N.C. 707, 34 S.E. 650 (1899). The act establishing the eastern district courts allowed appeal to the superior courts but such power was inadvertently omitted from the act creating the western district courts. *State v. Mallette*, 125 N.C. 718, 34 S.E. 651 (1899). This oddity was later removed by adding the words "or Superior court" to the statute thereby bringing almost all State appeals within the statute. See *State v. Savery*, 126 N.C. 1083, 36 S.E. 22 (1900).

¹¹¹ An acquittal in fact can never be rendered except upon the jury verdict of not guilty. Acquittals in law are those which occur by operation of law. *State v. Walton*, 186 N.C. 485, 119 S.E. 886 (1923).

¹¹² *E.g.*, *State v. Moore*, 84 N.C. 724 (1881); *State v. Lane*, 78 N.C. 547 (1878); *State v. Taylor*, 8 N.C. 462 (1821).

¹¹³ 126 N.C. 1083, 36 S.E. 22 (1900).

double jeopardy might apply in cases other than capital felonies.¹¹⁴ Second, if double jeopardy was in issue, the impaneling of the jury constituted primary jeopardy and any review would violate defendant's constitutional rights.¹¹⁵ Finally the court found that if double jeopardy was not an issue there was no authority for setting aside a general verdict of not guilty.

Two justices dissented.¹¹⁶ Their reasoning avoided the issues presented by the majority. Justice Montgomery, writing for the dissent, surmised that there had not been a general verdict but rather a quashal.¹¹⁷ He recognized that an acquittal, to be final and conclusive, must be had on a trial upon the merits of the case.¹¹⁸ Since the State had requested that the merits be presented and this request had been refused because the warrant was not supported by an affidavit, the action of the judge was in legal effect a quashal. Appeals from quashals are allowed under subsection three of section 15-179.

The effect of the *Savery* decision is to allow the trial judge to deny an appeal to the State by the simple use of terminology. By making a ruling on the validity of an indictment and by calling that ruling a general verdict the State is foreclosed from its appellate power. In *Savery* the judge's attention was called to the indictment not by defense counsel's motion to quash or to arrest judgment, but by evidence submitted on trial by the prosecuting witness. Regardless of how the court became aware of the defective warrant the legal effect of striking down that warrant should not be altered.

V. EXCEPTIONS TO N.C. GEN. STAT. § 15-179

There are several holdings which are of importance in a consideration of section 15-179. Some of these rightly come under the heading of "exceptions" because of their peculiar effect; others are merely inconsistencies. An understanding of these cases, however, aids in defining the area within which section 15-179 has effect.

¹¹⁴ 126 N.C. at 1086, 36 S.E. at 23.

¹¹⁵ 126 N.C. at 1086-87, 36 S.E. at 23.

¹¹⁶ 126 N.C. at 1091, 36 S.E. at 25.

¹¹⁷ 126 N.C. at 1092-93, 36 S.E. at 25.

¹¹⁸ The conclusions of the dissent in *Savery* present the more accurate view of the facts. The trial judge refused to hear evidence on the premise that the indictment would not support a finding by the jury. It is difficult to see how such a warrant could support a "general verdict of acquittal." If the jury cannot return a verdict on the warrant and evidence, it cannot reasonably be instructed to return a valid judicial "verdict" on the warrant alone.

The authority of section 15-179 has been challenged in a series of decisions which defy explanation.¹¹⁹ In these cases the court has recognized that there was no right of appeal on behalf of the State. Then it has proceeded, either on its own motion or on request of counsel, to discuss the issues involved and to make judicial decisions which affect the rights of the accused.¹²⁰ In these cases the possibility of double jeopardy is a live issue, and the court has allowed the defendant to be retried without deciding it. To continue this practice in the shadow of a statute¹²¹ which expressly prohibits such activities is to circumvent the statute and give judicial sanction to double jeopardy.

There are other cases which give the statute an effect in contrast to some interpretations.¹²² The constitution provides that in a justice's court "the party against whom the judgment is given may appeal to the Superior Court, where the matter shall be heard anew."¹²³ This language appears to give both the State and the accused the power to appeal, but the court has held that only the accused may appeal.¹²⁴ Though obviously limiting the language of the constitution, the decisions are based on sound reasoning. If the State appeals from an adverse verdict on the facts and has the matter heard *de novo*, it is putting the accused in double jeopardy. However, the clause should not be construed in a manner which limits all

¹¹⁹ See *State v. Burnett*, 173 N.C. 750, 91 S.E. 597 (1917); *State v. Branner*, 149 N.C. 559, 63 S.E. 169 (1908); *State v. Davidson*, 124 N.C. 839, 32 S.E. 957 (1899); *State v. Hinson*, 123 N.C. 755, 31 S.E. 854 (1898); *State v. Lane*, 78 N.C. 547 (1878).

¹²⁰ *E.g.*, *State v. Burnett*, 173 N.C. 750, 91 S.E. 597 (1917), where the court determined that there was no right of appeal but proceeded to answer the question presented since it was important to the due administration of law in the county courts and it was specially requested by counsel. The question in cases of this sort is: What dispositions and actions can be taken with regard to the decision on the "unappealable issue"? See *State v. Branner*, 149 N.C. 559, 63 S.E. 169 (1908), where the court stated: "The real difficulty present in the case here is whether the State had the right to appeal. We think not. The statute now regulates this matter.... While, therefore, error appears in the proceedings below, we cannot reverse the action of the court, as we have no jurisdiction, by reason of the statute, to do so, but we have considered the merits of the case to some extent, as they were fully discussed before us and we were asked to do so." *Id.* at 564, 63 S.E. at 171.

¹²¹ The statute referred to is N.C. GEN. STAT. § 15-179 (1953).

¹²² *E.g.*, *State v. Powell*, 86 N.C. 640 (1882).

¹²³ N.C. CONST. art. IV, § 27.

¹²⁴ See *State v. Powell*, 86 N.C. 640 (1882), which nullifies the constitutional argument but goes on to say when part of a criminal judgment is personal to the prosecuting witness and taxes him with costs, he may appeal since the proceeding assumes the character of a civil controversy.

appeals by the State, but only those which would prejudice the defendant. An appeal on questions of law should be allowed. The clear language of the constitution should prevail over the statute which allows appeal in certain cases "and no other."¹²⁵

Other decisions have influenced the interpretation of the statute as it applies to "criminal" actions.¹²⁶ Double jeopardy applies only in the criminal courts.¹²⁷ Therefore, only actions brought under criminal statutes are controlled by section 15-179. However, civil statutes are also within the purview of section 15-179 if they prescribe criminal punishments.¹²⁸ In such cases *neither* the State, if it is a party, nor a plaintiff who is a private citizen may appeal an adverse decision. It was held that to allow such appeal would constitute double jeopardy.¹²⁹

VI. CONCLUSION

The rights of the citizen and the State are actually two sides of the same coin. The citizen has the right not to be persecuted or convicted if he is not guilty of a criminal offense against the State. The State has the right and duty to convict and punish those individuals who are guilty of criminal offenses. The major consideration is the balancing of these rights on an equitable basis so that the rights of the State and its citizens may be preserved. As was pointed out earlier, various approaches have been taken in this balancing

¹²⁵ N.C. GEN. STAT. § 15-179 (1953) provides: "An appeal... may be taken by the State in the following cases, and no other..."

¹²⁶ *E.g.*, State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896); State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896). See State v. Cox, 215 N.C. 458, 2 S.E.2d 370, *aff'd* 216 N.C. 424, 5 S.E.2d 125 (1939), where the defendant was tried in the county court for illegal possession of gambling devices, he was found guilty and served notice of appeal. The judge said that he would change the judgment if the defendant would withdraw his appeal to the superior court; this the defendant did. The superior court judge then said that either the State or the defendant could appeal after the lower court granted a *nolo contendere*. The State appealed. The supreme court held that the superior court judge could not enlarge the right of the State to appeal.

¹²⁷ State v. Watson, 209 N.C. 229, 183 S.E. 286 (1936).

¹²⁸ State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896). The defendant was charged under the bastardy act which required that a fine be assessed. The defendant was found not guilty and the mother appealed. The court held that to allow the appeal would be to put the defendant in "double jeopardy." *Id.* at 1216, 24 S.E. at 663. Thus the civil offense was converted via the fine provision to a criminal offense. *But see* State v. Ivie, 118 N.C. 1227, 24 S.E. 539 (1896), where facts were the same but the lower court had exceeded its jurisdiction in hearing the case and the appeal was allowed to both the State and the prosecutrix.

¹²⁹ See State v. Ostwalt, 118 N.C. 1208, 24 S.E. 660 (1896).

process.¹³⁰ Some jurisdictions have emphasized the citizen's right to protection while others have given a free rein to the State to appeal criminal cases.¹³¹ Many jurisdictions have derogated the common law and have allowed some appeal by the State.¹³² Just where that appellate power should cease has been another question.

Perhaps the best approach to the problem is to allow appeals by the State on all questions of law.¹³³ The law is the basis of our society. It should contemplate its own best interest by providing appeals which would help to clarify and protect it. If questions of law are neglected when it could be to no one's harm to have them answered, society as a whole is put at a disadvantage. Not only may guilty individuals escape punishment but the citizenry must ride a crest of consequential errors promulgated in the court system.

Appeals by the State on questions of law would by definition exclude appeals from general verdicts. It would eliminate the necessity for distinctions between special verdicts, demurrers, constitutional questions and quashals. The courts could deal with legal problems and avoid the formal distinctions. Such a practice would pay dividends in efficient appellate procedure, definitive answers to legal questions, and swifter and surer justice for all.

ARNOLD T. WOOD

Constitutional Law—Cruel and Unusual—Capital Punishment

The Supreme Court of the United States recently denied certiorari to consider whether the eighth amendment prohibition against cruel and unusual punishment¹ prohibits the imposition of the death penalty on a convicted rapist.² However, Justice Goldberg, joined by Justices Douglas and Brennan, dissented and favored granting

¹³⁰ See notes 9-10 *supra* and accompanying text.

¹³¹ *Ibid.* Various states have adopted differing approaches between the extremes of no appellate power in the State and unlimited appellate power. *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958), allowing appeals by the State only when statutes are declared unconstitutional.

¹³² *E.g.*, ALA. CODE tit. 15, § 370 (1940) (Recomp. 1958); CONN. GEN. STAT. § 54-96 (1958); N.C. GEN. STAT. § 15-179 (1953).

¹³³ Our own court has questioned such an omission from N.C. GEN. STAT. § 15-179. See *State v. Todd*, 224 N.C. 776, 32 S.E.2d 313 (1944); *State v. Davidson*, 124 N.C. 839, 32 S.E. 957 (1899).

¹ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

² *Rudolph v. Alabama*, 32 U.S.L. WEEK 3154 (U.S. Oct. 22, 1963).